LIBRARY
SUPREME COURT, U. S.

SUP. CT. U.S.
SEP 2 1970
CLERK

No. 490

In the

Supreme Court of the United States

OCTOBER TERM, 1970

RICHARD B. OGILVIE, Individually and as Governor of the State of Illinois,

Petitioner,

vs.

LUSTER H. JACKSON, BRENETTA M. HOWELL, JESSE D. MADISON, ALFRED L. PORTIS, RICHARD J. BARNETT, L. ROSCOE BOLER, and RICHARD CRILEY, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

JOEL J. SPRAYREGEN
One First National Plaza
Chicago, Illinois 60670

JONATHAN D. SMITH
The Roger Baldwin Foundation
of ACLU, Inc.
Six South Clark Street
Chicago, Illinois 60603
(312) 726-6180

Attorneys for Respondents.

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 490

RICHARD B. OGILVIE, Individually and as Governor of the State of Illinois,

Petitioner,

vs.

LUSTER H. JACKSON, BRENETTA M. HOWELL, JESSE D. MADISON, ALFRED L. PORTIS, RICHARD J. BARNETT, L. ROSCOE BOLER, and RICHARD CRILEY, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

OPINIONS BELOW

The opinion of the District Court dismissing the cause remains unreported and appears as Appendix D to the

Petition (Petition, pp. 34-35). The opinion of the Court of Appeals for the Seventh Circuit and the dissenting opinion remain unreported and appear as Appendix B to the Petition (Petition, pp. 19-29).

JURISDICTION

The jurisdictional requisites are adequately stated in the Petition.

QUESTIONS PRESENTED

1. May a governor refuse to issue a writ of election to fill a vacancy in the United States House of Representatives where another such vacancy which occurred eighty days earlier was filled and where the vacancy would not otherwise be filled for more than a year and a quarter?

2. Do federal district courts have original subject matter jurisdiction:

   (a) to entertain causes alleging deprivations of constitutional rights pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983 without regard to antecedent judicial treatment of similar claims?

   (b) to issue mandatory injunctions directed to state officials to correct such deprivations?

3. Are claims of deprivations of constitutional rights in election matters justiciable?

STATEMENT OF THE CASE

Respondents, plaintiffs below, filed this suit in equity as a class action on behalf of themselves and all other qualified electors of the Sixth United States Congressional District of Illinois against Petitioner, the Governor of the

State of Illinois, alleging jurisdiction pursuant to 28 U.S.C. §§ 1343, 2201 and 2202 and asserting that their claim arose under 42 U.S.C. §§ 1983 and 1988 and Article 1, Section 2, Clause 4 of the Constitution of the United States and the Ninth and Fourteenth Amendments thereto. Respondents sought a declaration by the court that Petitioner's refusal to fill the vacancy existing in the office of Representative to the United States House of Representatives from their district was unconstitutional and also sought a mandatory injunction compelling Petitioner to fill the vacancy.

The factual basis for the action as alleged in the complaint and as stipulated by Petitioner is as follows. (Plaintiffs' Motion to Reinstate Request for Admission and Order of District Court of May 14, 1970) On November 5, 1968, Donald Rumsfeld and Daniel Ronan were duly elected to the office of Representative to the United States House of Representatives from the Thirteenth and Sixth Congressional Districts of Illinois, respectively. Both men were sworn, seated and began to serve in the House of Representatives. On May 25, 1969, Representative Rumsfeld resigned, and Petitioner issued his writ of election on May 27, 1969, calling a special election to be held November 25, 1969 to fill the vacancy. At that time, Philip Crane was duly elected to complete the unexpired Rumsfeld term. He was sworn, seated and is now serving. However, when Representative Ronan died on August 13, 1969, Petitioner took no action to fill the vacancy in the Sixth Congressional District office.

The District Court dismissed the cause on March 16, 1970. (Petition, Appendix D, pp. 34-35) Respondents appealed to the Court of Appeals for the Seventh Circuit which reversed the order of the District Court and remanded the cause on May 6, 1970. (Petition, Appendix

B, pp. 19-29) Upon remand, Respondents moved for summary judgment relying upon their affidavits and Petitioner's admission of all facts pleaded in the complaint. (Plaintiffs' Motion for Summary Judgment, filed May 25, 1970) The District Court granted summary judgment for Respondents (Order of District Court of May 25, 1970) and entered its final order of judgment. (Petition, Appendix C, pp. 30-33) Petitioner then filed his notice of appeal on June 17, 1970 in the District Court. He then requested from the District Court a stay of its final order. (Defendant's Application for Stay, filed June 17, 1970) The District Court granted a five day stay of the order. (Order of District Court of June 17, 1970) Petitioner then moved for a further stay of the order in the Court of Appeals (Petition, Appendix E, pp. 36-38) which was denied. (Order of Court of Appeals of July 20, 1970) Petitioner's appeal was docketed July 14, 1970 as Cause No. 18598 in the Court of Appeals for the Seventh Circuit. Petitioner has failed to further prosecute his appeal in the Court of Appeals, and the time for filing his brief in the Court of Appeals has expired pursuant to Rule 31(a), FED. R. APP. PROC.

ARGUMENT

It appears on the face of the Record herein that Petitioner is attempting to obtain a writ of certiorari for review of an interlocutory order of the Court of Appeals which reversed an order of the trial court dismissing the cause and remanded it for trial. It is clear that the standard established by this Court governing the granting of certiorari is that such interlocutory orders will not be reviewed except in extraordinary cases. *American Constr. Co.* v. *Jacksonville, T.&K.W. Ry.*, 148 U.S. 372, 384 (1893); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A. R.R.*, 389 U.S. 327 (1967) (per curiam). Respondents know of no extraordinary reason for abrogating the final judgment standard in this instance. Petitioner's method of seeking certiorari has improperly brought to the Court a record including matters which transpired much later than the interlocutory order of the Court of Appeals for which he seeks review. Respondents submit that Petitioner's failure to perfect his appeal in the Court of Appeals from the final order of the District Court in this cause and the procedural defects evident herein are sufficient reasons for denial of the Petition.

In addition, there are no compelling reasons for granting the writ of certiorari herein. As Judge Hastings noted in his partial dissent in the Court of Appeals, the construction of Article 1, Section 2, Clause 4 of the Constitution of the United States does present "fresh constitutional matter." However, the republic has existed for one hundred eighty-three years under the Constitution without the

meaning of that clause ever before having been questioned in a federal court. Respondents respectfully submit that the lack of urgency revealed by that heretofore unbroken silence and the lack of conflict among the federal circuits deriving therefrom strongly militate against granting of the writ. In addition, the decision of the Court of Appeals is clearly correct, and, except for the single original issue discussed above, every conclusion of the Court of Appeals is consistent with and based upon decisions of this Court.

The Governor's Refusal to Issue a Writ of Election was Clearly Unconstitutional.

Article I, Section 2, Clause 4 of the Constitution of the United States provides, "When vacancies happen in the Representation from any State, the Executive Authority thereof *shall* issue Writs of Election to fill such vacancies." [Emphasis added]. No federal court has ever directly construed this clause except in the instant case. However, the Court of Appeals for the Seventh Circuit found that the foregoing constitutional language conferred a duty upon the Petitioner stating, "The language is mandatory according to the ordinary meaning of its terms. We find no persuasive reason for reading it in a directory sense." (Petition, Appendix B, p. 23). The appellate court's interpretive method in reaching its conclusion is consistent with decisions of this Court. *Sturges* v. *Crowinshield,* 17 U.S. (4 Wheat.) 122, 202-03 (1819); *United States* v. *Sprague,* 282 U.S. 716, 731-32 (1931); *Escoe* v. *Zerbst,* 295 U.S. 490, 493-94 (1935); *Wright* v. *United States,* 302 U.S. 583, 588 (1937). It is also consistent with this Court's determination of the intent of the whole of Article I, Section 2 of the Constitution. *Wesberry* v. *Sanders,* 376 U.S. 1, 13-17 (1964).

The Respondents' claim that they are being denied their right to equal protection of the law contrary to the Fourteenth Amendment to the Constitution is also consistent with many decisions of this Court which provide additional support for the Seventh Circuit's decision herein. *Gray* v. *Sanders*, 372 U.S. 368 (1963); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969); *Wells* v. *Rockefeller*, 394 U.S. 542 (1969); *Hadley* v. *Junior College Dist.*, 397 U.S. 50 (1970).

The District Court Clearly Had Original Jurisdiction of the Subject Matter of This Action and Could Grant the Relief Requested.

The Court of Appeals expressly found that the District Court had jurisdiction of the subject matter of this action (Petition, Appendix B, p. 22), rejecting, *sub silentio*, Petitioner's argument that jurisdiction pursuant to 28 U.S.C. § 1343 is limited to instances where there exists an express, antecedent, judicial recognition of the right asserted. It is very clear from the express language of 28 U.S.C. § 1343 and 42 U.S.C. § 1983 that original jurisdiction of the subject matter lay in the District Court, and the Court of Appeals could not have held otherwise pursuant to this Court's opinions in many cases. *See, e.g., Ex parte Virginia*, 100 U.S. 339, 346-47 (1879); *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U.S. 278, 287-96 (1913); *Monroe* v. *Pape*, 365 U.S. 167, 171-72 (1961); *Baker* v. *Carr*, 369 U.S. 186, 199, 201 (1962). The lack of merit of the "antecedent recognition" argument of Petitioner is amply demonstrated by a comparison of *Minersville School Dist.* v. *Gobitis*, 310 U.S. 586 (1940), with *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), where the *Gobitis* finding that an asserted constitutional right was non-

existent did not bar jurisdiction under 28 U.S.C. § 1343 for subsequent litigation which overruled *Gobitis*.

The Court of Appeals also expressly rejected Petitioner's argument that the District Court had no power to mandatorily enjoin him to do his constitutional duty. (Petition, Appendix B, pp. 26-27) This is entirely consistent with the decisions of this Court which the Court of Appeals cited as authority for that determination, *Sterling* v. *Constantin*, 287 U.S. 378, 393 (1932), and *Williams* v. *Rhodes*, 393 U.S. 23, 35 (1968), and others. *See, e.g., Walkley* v. *Muscatine*, 73 U.S. (6 Wall.) 481, 483 (1867); *Bell* v. *Hood*, 327 U.S. 678, 684 (1946); *United States* v. *Oregon Medical Soc'y*, 343 U.S. 326, 333 (1952); *see also*, 28 U.S.C. § 1651(a).

Deprivations of Constitutional Rights in Election Matters are Clearly Justiciable.

The finding of the Court of Appeals that the instant claim is justiciable and is not a "political question" (Petition, Appendix B, p. 22) is compelled by *Baker* v. *Carr*, 369 U.S. 186 (1962). *Baker*, which dealt extensively with the problem of justiciability, found that the political question doctrine bars consideration only of questions of foreign relations (369 U.S. at 211), of dates of duration of hostilities (369 U.S. at 213), of the formal validity of enactments (369 U.S. at 214), of the status of Indian tribes (369 U.S. at 215) and of the republican form of government guarantee (369 U.S. at 218).

CONCLUSION

The Petition seeks review of an interlocutory order in such a manner that the issues are not properly presented for review. The opinion of the Seventh Circuit was clearly correct and consistent with relevant decisions of this Court. There is no conflict among the circuits. No other compelling reason exists for granting a writ of certiorari herein. It is respectfully submitted, therefore, that the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

JOEL J. SPRAYREGEN
One First National Plaza
Chicago, Illinois 60670

JONATHAN D. SMITH
The Roger Baldwin Foundation
of ACLU, Inc.
Six South Clark Street
Chicago, Illinois 60603
(312) 726-6180
Attorneys for Respondents

LIBRARY
SUPREME COURT, U. S.

FILED
SEP 25 1970
E. ROBERT SEAVER, CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 490

RICHARD B. OGILVIE, Individually and as Governor of the State of Illinois,

Petitioner,

v.

LESTER H. JACKSON, BRENETTA M. HOWELL, JESSIE M. MADISON, ALFRED L. PORTIS, RICHARD J. BARNETT, L. ROSCOE BOLER, and RICHARD CRILEY, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago, Illinois 60601 (312/793-3500),

JOHN GALVIN,
Assistant Attorney General,

Counsel for Petitioner.

Printed by Authority of the State of Illinois 365

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 490

RICHARD B. OGILVIE, Individually and as Governor of the State of Illinois,

Petitioner,

v.

LESTER H. JACKSON, BRENETTA M. HOWELL, JESSIE M. MADISON, ALFRED L. PORTIS, RICHARD J. BARNETT, L. ROSCOE BOLER, and RICHARD CRILEY, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

This Brief is addressed point by point to those arguments first raised in the Brief in Opposition.

I.

New Argument raised under "Questions Presented."

Respondents' Question No. 1 would assume that the fundamental issues in this case have somehow been determined. Those issues concern a) the constitutional duty of State executive authority when vacancies happen in the House of Representatives, b) the constitutional rights of the electors, and c) the jurisdiction of the federal courts. The parties agree that the involved rights and duties have never been judicially declared. To focus upon the governor's failure to issue a writ of election, as respondents do, obscures momentous fundamental issues of objective rights and duties by a misdirected subjective argument. It is the Petitioner's position that State Executive authority enjoys a constitutional discretion in the matter. Consistent with that position, the manner in which a discretion was exercised on a prior occasion is irrelevant.

Respondents' Question No. 2 (b) begs another essential issue in the case. It is conceded that federal district courts have power to issue mandatory injunctions against state officials who work deprivation of secured rights under color of law. That proposition is not in issue here. Here the real and actual issue is the existence, in district courts of limited jurisdiction, as defined by Congress, of *mandamus* power as to which certain conditions precedent are clearly required; being a) a duty in the state official, and b) a clear legal right in the relator to have the duty performed at the time application for the writ is made. (*U.S. ex rel.* v. *Lamont*, 155 U.S. 308).

In the context of this case, Respondents' Question No. 3 is so general as to be insignificant. This is simply not a

reapportionment case. This is simply not a voting rights case. And, only indirectly, can it be described in minor part as an election matter.

I. I

New Argument raised under "Statement of the Case."

We briefly elaborate on our contention that Petitioner's issuance of a writ of election in the instance of a prior vacancy in the House of Representatives is not relevant to this case. Had Petitioner negatively exercised his discretion on the resignation of Representative Rumsfeld, such circumstance would give no greater force to Respondents' theories. Where he affirmatively exercised his discretion, it should not, in logic, prejudice petitioner's theories. What was done in regard to the prior vacancy is beyond the present issues of jurisdiction, justiciability and federalism.

Petitioner's appeal to the Court of Appeals for the Seventh Circuit was for "*the sole purpose of returning the cause to that Court's jurisdiction for the consideration of" the Application for Stay* (See Petition, Appendix E paragraph one, page 36.) pursuant to Rule 27 of Rules of the Supreme Court of the United States.

> Rule 27. "Applications pursuant to 28 U.S.C. § 2101 (f) to a justice of this court will not normally be entertained unless application for a stay has first been made to a judge of the court rendering the decision sought to be reviewed, or to such court. . . ."

Action by Petitioner to meet a condition precedent imposed by rule of this Court should not prejudice his petition properly and timely filed under 28 U.S.C. § 1254 (1). Petitioner's Application For Stay of Mandate of United